

Nankervis v A.O. Smith Water Prods. Co.

2023 NY Slip Op 34019(U)

November 9, 2023

Supreme Court, New York County

Docket Number: Index No. 190346/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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INDEX NO. 190346/2017

KENNETH NANKERVIS,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 003

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., BURNHAM, LLC, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, COMPUTDYNE CORPORATION, CONSOLIDATED EDISON COMPANY, CRANE CO, CRANE CO., ECR INTERNATIONAL, CORP., FLOWSERVE US, INC., FMC CORPORATION, FORT KENT HOLDINGS, INC., FOSTER WHEELER, L.L.C., FULTON BOILER WORKS, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS LLC, ITT INDUSTRIES, INC., ITT LLC., OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RHEEM MANUFACTURING COMPANY, SUPERIOR BOILER WORKS, INC., THE FAIRBANKS COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, VIKING PUMP, INC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR BY MERGER TO BUFFALO PUMPS, INC., AMERICAN BILTRITE INC., AMERICAN HONDA MOTOR CO., INC. (AHM), ARVINMERITOR, INC., INDIVIDUALLY AND AS SUCCESSOR TO ROCKWELL AUTOMOTIVE, AURORA PUMP COMPANY, BEAZER EAST, INC., F/K/A KOPPERS COMPANY INC., BIRD INCORPORATED, BLACK & DECKER CORPORATION, BLACK & DECKER US, INC., BRIGGS & STRATTON CORP., CAMPBELL HASUFELD, LLC, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, COOPER CROUSE-HINDS, CROSBY VALVE LLC, CUMMINS, INC., DEWALT INDUSTRIAL TOOL CO., EMERSON ELECTRIC CO., FORD MOTOR COMPANY, GARDNER DENVER, INC., GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, GRINNELL LLC., HARLEY- DAVIDSON INC., HARLEY- DAVIDSON MOTOR CO., INC. F/K/A HARLEY- DAVIDSON MOTOR COMPANY SALES INC., HARLEY- DAVIDSON MOTOR COMPANY OPERATIONS INC., HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC./BENDIX, KAISER GYPSUM COMPANY,

DECISION + ORDER ON MOTION

INC., KARNAK CORPORATION, LENNOX INDUSTRIES,
 INC., LEVITON MANUFACTURING CO.
 INC., MANNINGTON MILLS, INC., MARMON HOLDINGS,
 INC., PERKINS ENGINES, INC., PNEUMO ABEX
 LLC, SUCCESSOR IN INTEREST TO ABEX
 CORPORATION (ABEX), R.W. BECKETT CORPORATION,
 RILEY POWER INC., SCHNEIDER ELECTRIC USA, INC.
 FORMERLY KNOWN AS SQUARE D COMPANY,
 SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST
 TO SIEMENS ENERGY & AUTOMATION, INC., SLANT/FIN
 CORPORATION, STANLEY BLACK & DECKER, INC., TDY
 INDUSTRIES, INC. F/K/A TELEDYNE INDUSTRIES, INC,
 INDIVIDUALLY AND AS SUCCESSOR TO FARRIS
 ENGINEERING, TRIUMPH MOTOCYCLES AMERICA
 LIMITED, ZY-TECH GLOBAL INDUSTRIES, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 341, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is ordered that the instant motion for renewal is decided for the reasons set forth below.

In this asbestos action, defendant R.W. Beckett Corporation (“Beckett”) moves for renewal and reargument of its prior motion for summary judgment dismissing plaintiff’s complaint and all crossclaims against them. This Court’s prior Decision/Order, dated June 29, 2021, denied defendant Beckett’s motion on the basis that it submitted no evidence in support of its motion, and specifically did not include an affidavit to which the motion referred (“Smith affidavit”). Defendant Beckett makes the instant motion on the basis that this Court overlooked such affidavit pursuant to CPLR §2221(d). Plaintiff opposes, noting that defendant Beckett incorrectly filed the Smith affidavit in the initial motion and failed to link it to the motion correctly for the Court to find. *See* Affirmation in Opposition to Defendant R.W. Beckett Corporation’s Motion for Leave to Renew and Reargue Its Summary Judgment Motion, p. 3.

CPLR §2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. “A motion for leave to reargue pursuant to CPLR §2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep’t 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted).

The Court notes that the Smith affidavit appears on NYSCEF as document no. 242, with a note relating it to document no. 220. However, defendant Beckett failed to link the affidavit to the initial motion (motion sequence no. 002). The initial Notice of Motion appears as document no. 219, within which all the motion documents are linked. In order for the Smith affidavit to have been properly filed as an exhibit to the initial motion, it would have to be filed as a document under motion sequence no. 002. As plaintiff has correctly pointed out, moving defendant’s failure to attach their only piece of evidence to the motion folder on NYSCEF does not constitute a “misapprehension” or information “overlooked” by the Court. Moreover, review of the affidavit does not indicate that defendant’s summary judgment motion would have been decided any differently even with its inclusion. Defendant Beckett’s corporate representative was not employed by defendant during the period relevant herein, and provided no evidence that defendant Beckett has never manufactured any asbestos-containing products. *See* NYSCEF Doc. No. 242, Affidavit of Michael Smith, dated July 22, 2020.

Defendant also moves for renewal pursuant to CPLR §2221(e) on the basis that it was unaware of verified interrogatory answers from Beckett Corporation in another action indicating that Beckett Corporation, and not defendant R.W. Beckett, could have been the manufacturer of the asbestos-containing products at issue herein. A party is permitted to move for leave to renew a decision to assert “new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination”. CPLR §2221(e). Plaintiff notes that it attached relevant portions of Beckett Corporation’s interrogatories as an exhibit in its opposition to the underlying summary judgment motion. This indicates that these interrogatory answers are not “new” to moving defendant. However, even if they were, defendant Beckett has failed to prove that such new information would change the outcome of the initial motion. Plaintiff has provided testimony that clearly differentiates between the types of products attributed to Beckett Corporation and moving defendant herein. *See* Affirmation in Opposition, *supra*, p. 15. Plaintiff has also provided contradictory evidence regarding defendant Beckett’s history of manufacturing asbestos-containing products.

Defendant R.W. Beckett has failed to prove that they would meet their burden at summary judgment even with the additional affidavit and new information. As such, the instant motion to renew and reargue is denied.

Accordingly, it is

ORDERED that defendant Beckett’s motion to renew their summary judgment motion is denied in its entirety; and it is further

ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.



11/09/2023

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE